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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GREGORY GENE LEWIS,
Plaintiff,
v.
ORRY MARCIANO, et al.,
Defendants.

Case No. EDCV 17-0181 SVW (SS)
**MEMORANDUM DECISION AND ORDER
DISMISSING THIRD AMENDED
COMPLAINT WITH LEAVE TO AMEND**

I.

INTRODUCTION

Plaintiff, a California state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 on February 1, 2017. Pending before the Court is Plaintiff's Third Amended Complaint. ("TAC," Dkt. No. 14). Congress mandates that district courts perform an initial screening of complaints in civil actions where a prisoner seeks redress from a governmental entity or employee. 28 U.S.C. § 1915A(a). This Court may dismiss such a complaint, or any portion thereof, before service of process if it concludes that the complaint (1) is frivolous or malicious,

1 (2) fails to state a claim upon which relief can be granted, or
2 (3) seeks monetary relief from a defendant who is immune from such
3 relief. 28 U.S.C. § 1915A(b) (1-2); see also Lopez v. Smith, 203
4 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000) (en banc).

5
6 The Third Amended Complaint is an improvement from earlier
7 complaints. However, the TAC still fails to show how each
8 Defendant's actions rose to the level of a constitutional
9 violation. It is not clear that Plaintiff will be able to state a
10 constitutional claim on these facts. However, because it is not
11 "absolutely clear that the deficiencies of the complaint could not
12 be cured by amendment," the Court will grant Plaintiff one final
13 opportunity to state a claim. Akhtar v. Mesa, 698 F.3d 1202, 1212
14 (9th Cir. 2012) (internal quotation marks omitted). Accordingly,
15 for the reasons stated below, the TAC is dismissed, with leave to
16 amend.¹

17 18 II.

19 ALLEGATIONS OF THE THIRD AMENDED COMPLAINT

20
21 Plaintiff sues the following individuals at the Chuckawalla
22 Valley State Prison ("CVSP"): (1) prison physician Orry Marciano;
23 "Supervisor Cook I" staff members (2) Viengochia and (3) Verduco;

24
25 ¹ A magistrate judge may dismiss a complaint with leave to amend
26 without the approval of a district judge. See McKeever v. Block,
27 932 F.2d 795, 798 (9th Cir. 1991). The Court finds that this Order
28 Dismissing with Leave to Amend is a non-dispositive Order.
However, pursuant to Federal Rule of Civil Procedure 72, if
Plaintiff disagrees, he may file an objection with the District
Judge. Bastidas v. Chappell, 791 F.3d 1155, 1162 (9th Cir. 2015).

1 and "Supervisor II" staff members (4) Perez and (5) Prieta. (TAC
2 at 1-2, 6). The TAC specifically alleges that Marciano is sued in
3 his individual capacity, but makes no parallel allegations as to
4 Viengochia, Verdusco, Perez and Prieta (collectively, the
5 "Supervisor Defendants"). (Id. at 3).

6
7 Plaintiff is a "high risk," elderly, obese inmate with a
8 history of seizures and chronic knee pain from having been shot
9 six times in the kneecap. (Id. at 4-5). One of his legs is shorter
10 than the other, which causes him to limp. (Id. at 5). He uses a
11 "medical devi[c]e cane" to help him walk. (Id. at 4).

12
13 Upon his arrival at CVSP in December 2015, Plaintiff was
14 assigned a job in the facility "C" yard dining hall kitchen, where
15 he had to work "with heavy pots and pans." (Id. at 2-3). Plaintiff
16 was told that the failure to comply with direct orders would result
17 in disciplinary infractions, the issuance of which would prevent
18 him from earning good behavior credits. (Id. at 2).

19
20 Plaintiff went to see Marciano about his work assignment and
21 asked for his assistance. (Id. at 3). Marciano had Plaintiff's
22 "entire medical file at his disposal." (Id. at 6). Marciano knew
23 that Plaintiff had just arrived from the California Rehabilitation
24 Center, where he had been removed from kitchen duty after one day
25 because of his "high risk medical factors." (Id. at 2). Marciano
26 also knew that Plaintiff was required to wear a "Mobility Impaired"
27 lime green vest due to his physical limitations. (Id. at 2-3).

1 However, instead of helping Plaintiff, Marciano kicked
2 Plaintiff out, sent him back to work, and allowed "various staff
3 members" to mistreat him. (Id. at 3-4). Viengochia, Verdusco,
4 Perez and Prieta acted with "wanton disregard for Plaintiff's
5 welfare" because they hid Plaintiff's cane and vest. (Id. at 6-
6 7). The staff members' cruelty caused Plaintiff "pain and
7 suffering," which triggered a mild stroke that required
8 hospitalization. (Id. at 3).

9
10 Even after his stroke, Plaintiff was sent back to work in the
11 kitchen. (Id. at 4). He was finally transferred to an "education"
12 job after enduring months of pain in his kitchen assignment. (Id.
13 at 5). Marciano has recently placed Plaintiff on "high risk"
14 status and is sending him to a medical facility.² (Id. at 4). This
15 transfer is "an acknowledgment of his previous failure to act" on
16 Plaintiff's behalf. (Id. at 6).

17
18 Plaintiff claims that Marciano was deliberately indifferent
19 to his serious medical needs because Marciano failed to respond to
20 his "cry for help" and "treat" him for four months.³ (Id. at 4-
21 5). Marciano's failure to intervene when Plaintiff sought help
22 regarding his work assignment also constituted cruel and unusual

23 _____
24 ² Since filing the TAC, Plaintiff notified the Court of his change
25 of address to the Correctional Training Facility - Soledad. (Dkt.
No. 15).

26 ³ It is unclear what Plaintiff means by the allegation that Marciano
27 failed to "treat" him in this context. It is possible that
28 Plaintiff is attempting to allege that Marciano's failure to secure
a transfer for Plaintiff from his kitchen assignment constituted a
failure to "treat" his medical condition.

1 punishment proscribed by the Eighth Amendment. (Id. at 5). "Staff
2 members" -- likely the Supervisor Defendants -- were "arbitrary
3 capricious individuals who shock[ed] the conscientious objections
4 [sic] of the crue[l] and unusual punishment," also in violation of
5 Plaintiff's Eighth Amendment rights. (Id. at 3). Plaintiff states
6 that he is seeking unspecified "monetary damages" against Marciano,
7 (id. at 3), but does not affirmatively seek relief as to the
8 Supervisor Defendants.

10 III.

11 DISCUSSION

12
13 Under 28 U.S.C. section 1915A(b), the Court must dismiss
14 Plaintiff's Second Amended Complaint due to multiple pleading
15 defects. However, the Court must grant a pro se litigant leave to
16 amend his defective complaint unless "it is absolutely clear that
17 the deficiencies of the complaint could not be cured by amendment."
18 Akhtar, 698 F.3d at 1212 (citation and internal quotation marks
19 omitted). Accordingly, for the reasons stated below, the Third
20 Amended Complaint is DISMISSED with leave to amend.

21 22 A. The TAC Violates Federal Rule Of Civil Procedure 8

23
24 Federal Rule of Civil Procedure 8 requires that a complaint
25 contain "'a short and plain statement of the claim showing that
26 the pleader is entitled to relief' in order to 'give the defendant
27 fair notice of what the . . . claim is and the grounds upon which
28 it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

1 Each claim must be simple, concise, and direct. Fed. R. Civ. P.
2 8(d)(1). However, as the Supreme Court has explained, "[t]he
3 complaint must contain more than 'a formulaic recitation of the
4 elements of a cause of action' . . . [and] must plead 'enough facts
5 to state a claim to relief that is plausible on its face.'" Twombly,
6 550 U.S. at 555 & 570. Rule 8 can be violated when a
7 complaint says "too much" or "too little." Knapp v. Hogan, 738
8 F.3d 1106, 1109 (9th Cir. 2013).

9
10 Here, the Third Amended Complaint fails to comply with Rule
11 8. The "factual allegations" are extremely vague and consist of
12 little more than legal conclusions, particularly with respect to
13 the Supervisor Defendants. The allegations do not state what each
14 Defendant separately did to violate any particular constitutional
15 right. The TAC therefore fails to provide Defendants with fair
16 notice of the claims in a short, clear and concise statement. See
17 Twombly, 550 U.S. at 555. Accordingly, the Third Amended Complaint
18 must be dismissed, with leave to amend.

19
20 **B. The TAC Fails To State A Deliberate Indifference Claim**

21
22 As the Court has previously explained, to state an Eighth
23 Amendment claim based on a prisoner's medical treatment, the
24 prisoner must demonstrate that the defendant was "deliberately
25 indifferent" to his "serious medical needs." Jett v. Penner, 439
26 F.3d 1091, 1096 (9th Cir. 2006); see also West v. Atkins, 487 U.S.
27 42, 49 (1988). To establish a "serious medical need," the prisoner
28 must demonstrate that "failure to treat a prisoner's condition

1 could result in further significant injury or the 'unnecessary and
2 wanton infliction of pain.'" Jett, 439 F.3d at 1096 (citation
3 omitted); see also Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th
4 Cir. 2006) (the existence of a serious medical need is determined
5 by an objective standard).

6
7 To establish "deliberate indifference" to such a need, the
8 prisoner must demonstrate: "(a) a purposeful act or failure to
9 respond to a prisoner's pain or possible medical need, and (b) harm
10 caused by the indifference." Id. Deliberate indifference "may
11 appear when prison officials deny, delay or intentionally interfere
12 with medical treatment, or it may be shown by the way in which
13 prison physicians provide medical care." Id. (citations omitted).
14 The defendant must have been subjectively aware of a serious risk
15 of harm and must have consciously disregarded that risk. See
16 Farmer v. Brennan, 511 U.S. 825, 845 (1994).

17
18 "[A] plaintiff's showing of nothing more than a difference
19 of medical opinion as to the need to pursue one course of treatment
20 over another [is] insufficient, as a matter of law, to establish
21 deliberate indifference.'" Wilhelm v. Rotman, 680 F.3d 1113, 1122
22 (9th Cir. 2012) (quoting Jackson v. McIntosh, 90 F.3d 330, 332 (9th
23 Cir. 1996)); see also Hamby v. Hammond, 821 F.3d 1085, 1092 (9th
24 Cir. 2016) ("[A] difference of opinion between a physician and the
25 prisoner -- or between medical professionals -- concerning what
26 medical care is appropriate does not amount to deliberate
27 indifference.") (quoting Snow v. McDaniel, 681 F.3d 978, 987 (9th
28 Cir. 2012), overruled in part on other grounds by Peralta v.

1 Dillard, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc)). Where a
2 physician defendant opts for one course of treatment over another,
3 or for no affirmative treatment at all, the plaintiff must show
4 that the option the physician chose was medically unacceptable
5 under the circumstances, and that the physician chose it in
6 conscious disregard of an excessive risk to the plaintiff's health.
7 Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004).

8
9 Plaintiff alleges that Marciano was aware of his medical
10 history and condition, but nonetheless failed to intervene when
11 Plaintiff asked him for help to get out of his assignment in the C
12 facility kitchen. It is questionable whether the failure to
13 reassign an inmate to a different work detail due to his physical
14 limitations is properly construed as a denial of medical
15 "treatment" such that the deliberate indifference standard applies,
16 as opposed to the more general "cruel and unusual punishment"
17 Eighth Amendment standard.⁴ However, even assuming that the

18
19 ⁴ "[D]ifferent types of conduct implicate different culpability
20 standards under the Eighth Amendment[.]" Moreland v. Las Vegas
21 Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (discussing
22 County of Sacramento v. Lewis, 523 U.S. 833 (1998)). As one court
has explained, although deliberate indifference to serious medical
needs is a type of cruel and unusual punishment prohibited by the
Eighth Amendment,

23 [t]here are a number of different types of claims that
24 arise under the Eighth Amendment's cruel and unusual
25 punishment clause, including distinct claims for basic
26 cruel and unusual punishment, for excessive force
against prisoners, and for deliberate indifference to
prisoners' serious medical needs. Courts apply a
different test to each.

27
28 Danley v. Allen, 540 F.3d 1298, 1306 (11th Cir. 2008) (citing
cases), overruled on other grounds as recognized by Randall v.

1 deliberate indifference framework applies, these spare allegations
2 fail to state a deliberate indifference claim.

3
4 Although Plaintiff alleges that his kitchen assignment
5 required him to work with "heavy pots and pans," the TAC does not
6 describe what he had to do with the pots and pans or explain why
7 it was dangerous for someone with his physical limitations to do
8 that work. Accordingly, it is not clear from the TAC that
9 Plaintiff's chronic knee pain, for example, constituted a serious
10 medical condition such that the failure to exempt him from kitchen
11 detail would likely result in significant additional injury or the
12 unnecessary and wanton infliction of pain. Similarly, Plaintiff
13 does not allege facts showing that Marciano's failure to exempt
14 him from his kitchen assignment was "medically unacceptable" and
15 was "chosen in conscious disregard of an excessive risk" to
16 Plaintiff's health. Hamby, 821 F.3d at 1092 (internal quotation
17 marks and citation omitted). Accordingly, the Third Amended
18 Complaint must be dismissed, with leave to amend.

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25 Scott, 610 F.3d 701, 705-06 (11th Cir. 2010); see also Harris v.
26 Lappin, 2009 WL 789756, at *10 (C.D. Cal. Mar. 19, 2009) ("Although
27 the Eighth Amendment is the source of protection against excessive
28 force and conditions of confinement posing a serious risk of
substantial harm, these are two distinct types of wrongs and are
evaluated under different legal tests.").

1 **C. The TAC Fails To State A Cruel And Unusual Punishment Claim**

2
3 Alternatively, Plaintiff appears to allege that Marciano's
4 failure to intervene in his work assignment, and the Supervisor
5 Defendants' confiscation of his cane and vest, constituted "cruel
6 and unusual punishment." These grounds for an Eighth Amendment
7 claim also fail.

8
9 Infliction of suffering on prisoners that is "totally without
10 penological justification" violates the Eighth Amendment. Rhodes
11 v. Chapman, 452 U.S. 337, 346 (1981). Only "the unnecessary and
12 wanton infliction of pain . . . constitutes cruel and unusual
13 punishment forbidden by the Eighth Amendment." Whitley v. Albers,
14 475 U.S. 312, 319 (1986) (internal quotation marks and citation
15 omitted). The punishment must constitute "shocking and barbarous
16 treatment." Grummett v. Rushen, 779 F.2d 491, 494 n.1 (9th Cir.
17 1985). "To be cruel and unusual punishment, conduct that does not
18 purport to be punishment at all must involve more than ordinary
19 lack of due care for the prisoner's interests or safety." Whitley,
20 475 U.S. at 319. "It is obduracy and wantonness, not inadvertence
21 or error in good faith, that characterize the conduct prohibited
22 by the Cruel and Unusual Punishments Clause" Wilson v.
23 Seiter, 501 U.S. 294, 299 (1991) (internal quotation marks and
24 citation omitted). Accordingly, "courts considering a prisoner's
25 [cruel and unusual punishment] claim must ask: 1) if the officials
26 acted with a sufficiently culpable state of mind; and 2) if the
27 alleged wrongdoing was objectively harmful enough to establish a
28

1 constitutional violation." Somers v. Thurman, 109 F.3d 614, 622
2 (9th Cir. 1997) (citing Hudson v. McMillian, 503 U.S. 1, 8 (1992)).
3

4 The Third Amended Complaint simply does not provide sufficient
5 facts about Plaintiff's work detail, or his alleged inability to
6 perform the tasks required of him, to establish that Marciano's
7 failure to pull him from his work as a kitchen lineman was "shocking
8 and barbarous treatment" with no penological justification. The
9 Eighth Amendment claims against the Supervisor Defendants also
10 fail. The entirety of Plaintiff's claims against these four
11 Defendants states that they:

12
13 all acted with wanton disregard for Plaintiff's welfare
14 for they all hid[] Plaintiff['s] medical devi[c]e 'cane'
15 and his vest 'mobility impair' vest [sic]. These
16 defendants are all just as guilty as defendant Marciano.
17

18 (TAC at 6-7).
19

20 This brief, conclusory allegation does not distinguish what
21 each of the Supervisor Defendants separately did, or describe when
22 or where the acts occurred. Accordingly, the Third Amended
23 Complaint must be dismissed, with leave to amend.
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1 IV.

2 CONCLUSION

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4 For the reasons stated above, the Third Amended Complaint is
5 dismissed with leave to amend. If Plaintiff still wishes to pursue
6 this action, he is granted **thirty (30) days** from the date of this
7 Memorandum and Order within which to file a Fourth Amended
8 Complaint. In any amended complaint, Plaintiff shall **cure the**
9 **defects** described above. **Plaintiff shall not include new**
10 **defendants or new allegations that are not reasonably related to**
11 **the claims asserted in the TAC.** The Fourth Amended Complaint, if
12 any, shall be complete in itself and shall not refer in any manner
13 to the original Complaint or any prior Amended Complaint. Its
14 caption page shall bear the designation "Fourth Amended Complaint"
15 and the case number assigned to this action.

16
17 The Fourth Amended Complaint should be short and concise. In
18 any amended complaint, Plaintiff should confine his allegations to
19 those operative facts supporting each of his claims. Plaintiff is
20 advised that pursuant to Federal Rule of Civil Procedure 8(a), all
21 that is required is a "short and plain statement of the claim
22 showing that the pleader is entitled to relief." **Plaintiff is**
23 **strongly encouraged to utilize the standard civil rights complaint**
24 **form when filing any amended complaint, a copy of which is attached.**

25 In any amended complaint, Plaintiff should identify the nature of
26 each separate legal claim and the Defendant (by name) against whom
27 the claim is asserted, and make clear what specific factual
28 allegations support each separate claim. Plaintiff is strongly

1 encouraged to keep his statements concise and to omit irrelevant
2 details. It is not necessary for Plaintiff to cite case law or
3 include legal argument.

4
5 Plaintiff is explicitly cautioned that failure to timely file
6 a Fourth Amended Complaint, or failure to correct the deficiencies
7 described above, may result in a recommendation to the District
8 Judge that this action be dismissed with prejudice for failure to
9 prosecute and obey Court orders pursuant to Federal Rule of Civil
10 Procedure 41(b). Plaintiff is also advised that this is a non-
11 dispositive order pursuant to Federal Rule of Civil Procedure
12 72(a). Plaintiff is advised that if he no longer wishes to pursue
13 this action, he may voluntarily dismiss it by filing a Notice of
14 Dismissal in accordance with Federal Rule of Civil Procedure
15 41(a)(1). A form Notice of Dismissal is attached for Plaintiffs'
16 convenience. If Plaintiff utilizes the Notice of Dismissal, he is
17 instructed to clearly state whether he is dismissing the entire
18 action or only certain claims or certain Defendants.

19
20 DATED: March 29, 2018

21 /s/
22 SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

23 THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW OR
24 ANY OTHER LEGAL DATABASE.